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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

EJAAN DUPREE McCOY,

Defendant and Appellant.

C043674

(Sup.Ct.No. SC059733A)

In this case which is now before us for the third time, defendant Ejaan McCoy appeals from his resentencing following our remand to the trial court. Defendant contends: (1) The trial court used an improper sentencing factor to aggravate defendant's sentence on count 1 (voluntary manslaughter), in violation of state sentencing rules, the state guarantee of the right to a jury determination, state and federal due process, and the state and federal prohibition of double jeopardy.

(2) Defendant's trial counsel was ineffective for failing to object to the trial court's failure to state reasons for consecutive sentences. (3) The trial court's sentencing violated *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*). We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, defendant McCoy and codefendant Derrick Lakey (not a party to this appeal) were convicted of multiple counts involving multiple victims in a drive-by shooting. McCoy was found guilty of the murder of Calvin Willis (count 1; Pen. Code, § 187 [all further undesignated section references are to the Penal Code]), the attempted murder of Tubiya McCormick (count 2; §§ 664/187), and the attempted murder of Simon McCormick (count 4; §§ 664/187); he was also found guilty of assault with a semi-automatic firearm, a lesser included offense to the attempted murder of Tashambe Willis (count 3; § 245, subd. (b)), and of being a felon in possession of a firearm (count 5; § 12021, subd. (a)). In addition, the jury found true as to counts 1 through 4 that McCoy was armed with and personally used a firearm (§§ 12022, subd. (a)(1), 12022.5, subd. (a)), that he inflicted injury or death by discharging the firearm from a motor vehicle (§ 12022.55), and that the offenses were serious and violent felonies (§§ 1192.7, subd. (c)(8), 667.5, subd.

(c)(8)); as to count 2, the jury also found that McCoy personally inflicted great bodily injury (§ 12022.7.)¹ The trial court sentenced McCoy to a determinate term of 25 years 4 months plus a consecutively sentenced indeterminate term of 25 years to life, for an aggregate term of 50 years 4 months to life.

In our first opinion in this matter, we reversed McCoy's convictions on counts 1, 2, and 4 because the trial court erred prejudicially in instructing the jury on imperfect self-defense. However, we rejected McCoy's other contentions and affirmed his remaining convictions.

The California Supreme Court granted review to address only issues raised by Lakey. The court reversed and remanded with directions to reconsider two of his convictions. (*People v. McCoy* (2001) 25 Cal.4th 1111.)

On remand, we noted that by not granting review as to McCoy, the Supreme Court had impliedly approved our holding that his convictions on counts 1, 2, and 4 were improper. Therefore, we remanded the case to the trial court as to him with directions that his convictions on counts 1, 2, and 4 be reversed, unless the People elected not to retry him on those counts. In that case, we said, the trial court should deem the remitter a modification of the judgment and should resentence

¹ All facts in this opinion concerning prior proceedings are taken from our previous unpublished opinion in this matter (*People v. McCoy et al.* (May 7, 2002, C024654)), which we judicially notice. (Evid. Code, §§ 452, subd. (c); 459.)

McCoy on count 1 for voluntary manslaughter and on counts 2 and 4 for attempted voluntary manslaughter.

On remand, the People elected not to retry McCoy on counts 1, 2, and 4. On October 9, 2002, the trial court then resentenced him on those counts as follows:

Count 1 (voluntary manslaughter; § 192, subd. (a)): 11 years (the upper term), plus 10 years for the enhancement pursuant to section 12022.55.

Count 2 (attempted voluntary manslaughter, §§ 664/192, subd. (a)): one year (one-third the midterm) consecutive to count 1, plus three years four months (one-third the upper term) for the enhancement pursuant to section 12022.55, also consecutive to count 1.

Count 4 (attempted voluntary manslaughter, §§ 664/192, subd. (a)): one year (one-third the midterm) consecutive to count 1, plus three years four months (one-third the upper term) for the enhancement pursuant to section 12022.5, subdivision (a), also consecutive to count 1.²

Adding these sentences to those previously determined on count 3 (assault with a semi-automatic firearm, § 245, subd. (b)) and count 5 (felon in possession of firearm, § 12021, subd.

² The trial court first announced that as to count 4 it would impose a sentence of three years four months for the enhancement pursuant to section 12022.55, as on the other counts; then the court realized that enhancement had previously been stricken and instead chose the enhancement pursuant to section 12022.5, subdivision (a). The court stayed all other enhancements pursuant to section 654.

(a)) and now reimposed -- two years (the midterm) on count 3 and eight months (the midterm) on count 5, both consecutive to count 1 -- the trial court arrived at an aggregate sentence of 32 years 4 months.

DISCUSSION

I

The underlying facts

We recite the facts, as set out in *People v. McCoy et al.*, *supra*, only so far as necessary to explain the trial court's sentencing decisions.

On the evening of September 4, 1995, defendant and codefendant Lakey drove up to a group of people, including Calvin Willis, Tashambe Willis, Tubiya McCormick, and Simon McCormick, who were standing on the sidewalk at an intersection in Stockton. When Simon McCormick saw defendant's car drive up, he became nervous and hid behind a tree.

Defendant leaned out the window and shouted "What's up now, nigger?" A flurry of shots came from the car; both defendant and Lakey were firing handguns. Tubiya McCormick was shot in the chest, but survived. Calvin Willis was fatally shot in the back of the head as he tried to run away. Tashambe Willis and Simon McCormick were not shot.

The prosecution contended that defendant and Lakey belonged to one of two feuding Stockton gangs. The shooting was intended as retaliation in the feud.

Defendant testified and admitted shooting Calvin Willis, but claimed he had feared being shot by one of the people at the

intersection. He denied current gang membership and knowledge of the feud.

Sentencing on remand

The trial court stated its tentative sentencing choices, which included the upper term on count 1 and on all unstayed enhancements, plus consecutive sentencing on all counts and unstayed enhancements. The court asked defense counsel for comment. Counsel objected only to the upper term on the enhancements. The trial court then imposed sentence as it had indicated it would do.

The trial court imposed the upper term on count 1 (voluntary manslaughter of Calvin Willis) because the victims were particularly vulnerable in that they were simply minding their own business when attacked, and because defendant acted with "a premeditation and a cold and ruthless intent to do as much injury as he possibly could after giving it considerable thought." The court imposed the upper term or one-third of the upper term on the unstayed enhancements because "by using a semi-automatic firearm at that time, from a vehicle, under those circumstances, with the number of people that were in the area at the time, the defendant exposed a great number of people, even a large [sic] number of people than those he intentionally tried to shoot, he exposed a great number of people to possible risk of serious or fatal harm"; moreover, he had plenty of time to consider the risk he was imposing before he did it.

The trial court ran sentence on counts 2 (attempted voluntary manslaughter of Tubiya McCormick), 3 (assault with a

semi-automatic firearm on Tashambe Willis), and 4 (attempted voluntary manslaughter of Simon McCormick) consecutive to count 1 because the four counts all involved different victims.

II

Defendant contends it was improper to use premeditation as an aggravating factor on count 1 because: (1) Voluntary manslaughter is inconsistent with, and excludes, premeditation and deliberation. (2) The prosecution's decision to accept a reduction of the verdict on count 1 amounted to an implied acquittal of defendant on the charge of murder. (3) By specifically finding in the first trial that the attempted murders charged in other counts had *not* been premeditated and deliberated, the jury necessarily rejected the theory that defendant acted with premeditation and deliberation as to count 1; it must have convicted him of first degree murder on the alternative theory of murder committed during a drive-by shooting. According to defendant, therefore, the trial court's use of premeditation as a sentencing factor violated state decisional law, the state and federal constitutional mandates for trial by jury and due process, and the prohibition against double jeopardy.

We need not address these arguments, for two reasons. First, defendant did not object in the trial court to the use of this aggravating factor. Second, the court used additional factors in aggravation, including the victims' vulnerability, as to which defendant concedes in his opening brief that "no legal

impropriety attaches;"³ thus, even a successful objection to the use of premeditation would not have made a difference.

Defendant's failure to object to the sentence imposed on count 1 forfeits his claim of error under the well-established rule of *People v. Scott* (1994) 9 Cal.4th 331, 353 (*Scott*). The decisions defendant cites as authority to avoid that rule are inapposite. In *People v. Hanson* (2000) 23 Cal.4th 355, where a trial court increased the amount of the defendant's restitution fine on remand, the opinion is silent about whether trial counsel objected or whether the Attorney General raised a claim of *Scott* waiver for failure to object. (*Id.* at pp. 357-358.) And in *People v. Ernst* (1994) 8 Cal.4th 441, the issue -- whether a defendant's conviction by court trial could be upheld if he had not expressly waived jury trial -- has nothing to do with the sentencing issue resolved in *Scott*.

Defendant's fallback argument that trial counsel was ineffective for failing to object is unpersuasive. To prevail on a claim of ineffective assistance of counsel, a defendant must show not only that counsel was ineffective but that it is reasonably probably defendant would have obtained a better outcome had counsel acted effectively. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Here, defendant cannot make that showing.

³ So far as defendant withdraws that concession in his supplemental and reply briefs in reliance on *Blakely, supra*, 542 U.S.____ [159 L.Ed.2d 403], we discuss that point below.

Even if an objection to the trial court's use of premeditation as an aggravating factor might have had merit (which we do not find), the court also used two other aggravating factors: (1) the victims' vulnerability (Cal. Rules of Court, rule 4.421(a)(3)), and (2) defendant's "cold and ruthless" determination "to do as much injury as he possibly could" (Cal. Rules of Court, rule 4.421(a)(1) ["high degree of cruelty, viciousness, or callousness"]). A single valid aggravating factor justifies imposing the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) Defendant has not shown that either of these factors was improper on the evidence before the court. Thus, even a successful objection to the use of premeditation as an aggravating factor would not have been reasonably likely to earn defendant a lesser sentence on count 1. His claim of ineffective assistance of counsel therefore fails as to count 1.

III

Defendant separately contends trial counsel was ineffective in failing to object to the imposition of consecutive sentencing. We disagree.

The trial court stated it was running the sentences on counts 2 through 4 consecutive to that on count 1 because each count involved a different victim. That is a valid reason for imposing consecutive sentencing. (Cf. Cal. Rules of Court, rule 4.425(a)(1), (a)(2) [crimes and their objectives predominantly independent of each other; crimes involved separate acts of violence]; *People v. Young* (1992) 11 Cal.App.4th 1299, 1312.)

Likewise, count 5 (felon in possession of a firearm) involved a different objective from the other counts (Cal. Rules of Court, rule 4.425(a)(1)); thus, though the trial court did not state a reason for running sentence on that count consecutive to the rest, an objection would have been futile. There is no reasonable probability defendant would have obtained a lesser sentence had counsel objected. (*People v. Maury, supra*, 30 Cal.4th at p. 389.)

IV

In a supplemental brief, defendant contends that all of the trial court's sentencing, including the imposition of upper terms and of consecutive sentencing, was invalid under *Blakely, supra*, 542 U.S. ____ [159 L.Ed.2d 403]. We disagree.

Upper terms

As noted, the trial court sentenced defendant to the upper term on count 1 and on its enhancement under section 12022.55, and to one-third the upper term for the other unstayed enhancements (on count 3 under § 12022.55 and on count 4 under § 12022.5, subd. (a)). Relying on *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and *Blakely, supra*, 542 U.S. ____, ____ [159 L.Ed.2d at pp. 413-414], defendant contends the trial court erred by imposing these sentences because the court relied on facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The People contend defendant forfeited his right to have a jury determine any facts essential to the imposition of the upper term. They rely on *United States v. Cotton* (2002) 535 U.S. 625 [152 L.Ed.2d 860]. In *Cotton*, the trial court sentenced defendants to life in prison based on enhancements for drug quantities that were not alleged in the indictment nor found by the jury. During defendants' appeal, *Apprendi* was decided. (*Apprendi, supra*, 530 U.S. 466 [147 L.Ed.2d 435].) Defendants argued their sentences were invalid under *Apprendi*. (*Cotton, supra*, 535 U.S. at pp. 628-629.) The Supreme Court held defendants forfeited their claim of *Apprendi* error because they did not raise it in the trial court. (*Cotton, supra*, at pp. 631-632.)

The *Cotton* court applied the "plain-error" test of Federal Rules of Criminal Procedure 52(b).⁴ Under that test an appellate court can correct an error that was not raised at trial only if there was (1) error (2) that is "plain," (3) that affects substantial rights, and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings. (*Cotton, supra*, 535 U.S. at p. 631 [152 L.Ed.2d at p. 868].) An error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings where evidence of the

⁴ Federal Rules of Criminal Procedure (18 U.S.C.) 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

fact not submitted to the jury was overwhelming and essentially uncontroverted. (*Id.* at pp. 632-633 [152 L.Ed.2d at p. 868].)

We decline to find defendant forfeited his *Blakely* claim for several reasons. First, *Cotton* is based on the Federal Rules of Criminal Procedure which are not binding on a state court. Second, *Cotton's* view of the forfeiture rule is at odds with California's. While it is true that ordinarily a reviewing court will not consider a challenge to a ruling if an objection could have been but was not made below, this forfeiture rule is not automatic. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) The purpose of the rule is to encourage parties to bring errors to the attention of the trial court so they may be corrected. (*Scott, supra*, 9 Cal.4th at pp. 351, 353; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) This purpose is not served by application of the forfeiture rule in this case. *Blakely* "worked a sea change in the body of sentencing law" (*U.S. v. Ameline* (9th Cir. 2004) 376 F.3d 967, 973); realistically, it is not probable that an objection would have caused the trial court to attempt to correct the alleged error. Traditionally, an objection has not been required to preserve an issue for appeal when it would have been futile or wholly unsupported by existing substantive law. (*People v. Welch* (1993) 5 Cal.4th 228, 237; *People v. Turner* (1990) 50 Cal.3d 668, 703; *People v. Ogunmola* (1985) 39 Cal.3d 120, 123, fn. 4, overruled on another point in *People v. Ewoldt* (1994) 7 Cal.4th 380, 386-387.) California courts have discretion to address constitutional issues raised for the first time on appeal, especially in the area of penal

law. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; see also *People v. Saunders, supra*, 5 Cal.4th at p. 589, fn. 5 ["Defendant's failure to object also would not preclude his asserting on appeal that he was denied his constitutional right to a jury trial"].) Finally, application of the plain error test as set forth in *Cotton* requires an analysis of the merits of the claim (see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 268, fn. 2), so a finding of forfeiture does not even serve judicial economy.

Assuming, without deciding, that it was error not to submit to the jury for determination the facts relied upon for imposition of the upper term, we find any error harmless beyond a reasonable doubt.

Generally, the failure to submit factual issues to the jury is a structural error that requires reversal per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-281 [124 L.Ed.2d 182, 189-190].) Recently, the United States Supreme Court has indicated partial denial of the right to a jury trial is not always reversible per se. In *Neder v. United States* (1999) 527 U.S. 1, 8-15 [144 L.Ed.2d 35, 46-51], the court held the failure to instruct a jury on an element of a crime, such that the element is never submitted to a jury, can be harmless. "[W]here a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." (*Id.* at p. 17.)

In *People v. Sengpadychith* (2001) 26 Cal.4th 316 (*Sengpadychith*), the California Supreme Court addressed whether and to what extent *Apprendi* error should be subject to harmless error analysis. In *Sengpadychith*, the trial court submitted a charged gang enhancement to the jury, but did not instruct the jury on one element of the enhancement. (*Id.* at p. 322.) The California Supreme Court concluded this *Apprendi* error was subject to harmless error review under the federal *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] standard. The error was reversible “unless it can be shown ‘beyond a reasonable doubt’ that the error did not contribute to the jury’s verdict.” (*Sengpadychith*, at p. 326; see also *People v. Smith* (2003) 110 Cal.App.4th 1072, 1079, fn. 9 [following *Sengpadychith*]; *U.S. v. Nealy* (11th Cir. 2000) 232 F.3d 825, 829 [“*Apprendi* did not recognize or create a structural error that would require per se reversal”]; *U.S. v. Swatzie* (11th Cir. 2000) 228 F.3d 1278, 1283 [“The error in *Neder* is in material respects indistinguishable from error under *Apprendi*” and thus *Apprendi* error is subject to harmless error review].)

Such is the case here. The trial court relied on the victims’ vulnerability, among other factors, in imposing the upper term on count 1. In imposing the upper term (or one-third the upper term) on the enhancements, the court found that the manner in which defendant carried out his crimes necessarily exposed a great number of people to the risk of serious or fatal injury and that defendant had had plenty of time to consider the risk he was imposing before he did so. The evidence in support

of these findings was overwhelming and uncontroverted. Any error in failing to submit these issues to the jury was harmless beyond a reasonable doubt.

Consecutive sentencing

Defendant's challenge to the trial court's imposition of consecutive sentencing fails because the rule of *Apprendi* and *Blakely* does not apply to our state's consecutive sentencing scheme.

Section 669 imposes an affirmative duty on a sentencing court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. (*In re Calhoun* (1976) 17 Cal.3d 75, 80-81.) However, that section leaves this decision to the court's discretion. (*People v. Jenkins* (1995) 10 Cal.4th 234, 255-256.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.)

Section 669 provides that upon the sentencing court's failure to determine whether multiple sentences shall run concurrently or consecutively, then the terms shall run

concurrently. This provision reflects the Legislature's policy of "speedy dispatch and certainty" of criminal judgments and the sensible notion that a defendant should not be required to serve a sentence that has not been imposed by a court. (See *In re Calhoun*, *supra*, 17 Cal.3d at p. 82.) This provision does not relieve a sentencing court of the affirmative duty to determine whether sentences for multiple crimes should be served concurrently or consecutively. (*Ibid.*) And it does not create a presumption or other entitlement to concurrent sentencing. Under section 669, a defendant convicted of multiple offenses is entitled to the exercise of the sentencing court's discretion, but is not entitled to a particular result.

The sentencing court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement ensures that the sentencing judge analyzes the problem and recognizes the grounds for the decision, assists meaningful appellate review, and enhances public confidence in the system by showing sentencing decisions are careful, reasoned, and equitable. (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) But the requirement that reasons for a sentence choice be stated does not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to trial courts the decision whether to impose concurrent or consecutive sentencing under our sentencing laws is not precluded by *Blakely*. In this state,

every person who commits multiple crimes knows that he or she is risking consecutive sentencing. While a convicted criminal has a right to the exercise of the trial court's discretion, the person does not have a legal right to a concurrent sentence. Accordingly, the rule of *Apprendi* and *Blakely* does not apply to California's consecutive sentencing scheme.

DISPOSITION

The judgment is affirmed.

_____, MORRISON, J.

I concur:

_____, BUTZ, J.

I concur in the opinion except for part IV where I concur in the result.

_____, SIMS, Acting P.J.